The USSC held that there is a right to consume pornography in private, *Stanley v. Georgia*, 394 U.S. 557 (1969), while others have argued that pornography violates the rights of people, particularly the rights of women and children. See Catharine A. MacKinnon, *Sex Equality* 1532–1626 (2001). The Court stated that "the makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness." Whose happiness counts? Against what other rights should this happiness be balanced? And is pornography about "happiness"? Consider that the SACC, in *Curtis v. The Minister of Safety and Security and others*, 1996 (3) SALR 617 (CC), with reference to the Canadian decision *R. v. Butler*, [1992] 1 S.C.R. 452, argued that pornography should not be viewed from "a public-morality basis that underpins the American approach," but rather judged according to "a standard based explicitly on the harm believed to be engendered by certain kinds of sexually explicit material." The Court, nonetheless, upheld its use in private. Remember that some crimes, particularly those committed against children and women, many of which are sexual in nature, are committed at home. Should this make a difference in considering the inviolability of privacy rights?

4. *"Private parts."* Places that can be considered private, where searches have to be based on law and be justifiable, are clearly not limited to the home and the prison cell. But does the constitutional protection of privacy extend to the body, to one's "private parts"? In the U.S., it was held that, although vaginal searches "give us cause for concern as they implicate and threaten the highest degree of dignity," after balancing all factors, they did not constitute a violation of privacy, since "the search was not unreasonable by its very nature." *Rodriques v. Furtado*, 950 F.2d 805 (1st Cir.1991). Is a right to dignity at stake here as well, or is this a violation of physical integrity? The USSC also held that surgery may constitute a potentially unconstitutional search in *Winston v. Lee*, 470 U.S. 753 (1985). Consider the constitutional requirements necessary to permit such intrusions. If one can consent to surgery, can one consent to a search of one's house or car in a criminal investigation? If a legal system accepts implied consent in medical cases, does it have to accept implied consent to police activities, or is there a difference? How do you know whether someone has "consented" freely to a violation of privacy? Can one voluntarily forfeit one's privacy? Can one consent to the abridgement of a fundamental right?

C. THE RIGHT TO BODILY SELF-DETERMINATION

Cases on dignity, autonomy, and privacy do not deal only with territorial understandings of constitutional protection but also with decisional aspects of personhood. The right to bodily self-determination—the right to dispose of one's body as one chooses—is an integral component of this. The following cases illustrate that the private is not restricted to the literal space of the home but extends to the private body as well. This is supported by a strong philosophical and jurisprudential tradition that understands autonomy in terms of ownership of one's body. Western thinking tends toward the position that human beings have a broad individual right to make decisions on matters with profound consequences for one's body and one's life. Thus we find the right to privacy prominently in the so-called Biomedicine Convention, the "Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine" (Oviedo, 4.IV.1997), a European international treaty that seeks to complement the European HR Convention in an effort to protect the dignity and identity of all human beings without discrimination. See H.D.C. Roscam Abbing, *The Convention on Human Rights and Biomedicine: An Appraisal of the Council of Europe Convention*, European Journal of Health Law 377–87 (1998). But where are the limits of this kind of self-determination? Grand theories often ignore that a right to one's body is bound to social status, race, and gender. In addition, the tradition of self-ownership may, for example, conflict with conceptions of life and the body which stem from theoretical frameworks that view life as a given, either by nature or some metaphysical force, as in certain theological traditions. The long-standing and controversial debates about reproductive rights, at the forefront of which is the right to an abortion, raise these issues in complex ways, which is why we discuss them first. More recently, related questions have arisen around whether, given that one cannot take the life of another person, one has a legal right to take one's own life. Since suicide is not prohibited in most jurisdictions, these cases revolve around the issue of assisted suicide.

C.1. ABORTION

ROE v. WADE

Supreme Court (United States).
410 U.S. 113 (1973).

[A pregnant woman and others challenged the constitutionality of a statute making a crime to "procure an abortion" except "by medical advice for the purpose of saving the life of the mother."]

Justice Blackmun delivered the opinion of the Court.

* * * We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.

In addition, population growth, pollution, poverty, and racial overtones tend to complicate and not to simplify the problem. * * *

The principal thrust of appellant's attack on the Texas statutes is that they improperly invade a right, said to be possessed by the pregnant woman, to choose to terminate her pregnancy. * * *

The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, * * * [the] Court has recognized that a right of personal privacy, * * * does exist under the Constitution. [Based

on precedents] only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage * * *; procreation * * *; contraception * * *; family relationships * * *; and childrearing and education * * *.

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or [in] the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.

On the basis of elements such as these, appellant and some amici argue that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree. * * * [The] Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. * * * [A] State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The privacy right involved, therefore, cannot be said to be absolute. In fact, it is not clear to us that the claim asserted by some *amici* that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past [in cases on vaccination and sterilization]. We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified, and must be considered against important state interests in regulation.

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA v. CASEY

Supreme Court (United States).
505 U.S. 833 (1992).

Justice O'Connor, Justice Kennedy, and Justice Souter delivered the judgment of the Court and the opinion of the Court with respect to Parts I, II, III, V–A, V–C and VI, and an opinion with respect to other Parts.

I

Liberty finds no refuge in a jurisprudence of doubt. Yet 19 years after our holding that the Constitution protects a woman's right to terminate her pregnancy in its early stages, *Roe v. Wade* 410 U.S. 113, that definition of liberty is still questioned. * * *

At issue in these cases are five provisions of the Pennsylvania Abortion Control Act of 1982, as amended in 1988 and 1989.

* * * *Roe*'s essential holding, the holding we reaffirm, has three parts. First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. These principles do not contradict one another; and we adhere to each.

II

Constitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment. It declares that no State shall "deprive any person of life, liberty, or property, without due process of law." * * *

It is also tempting, for the same reason, to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified. See *Michael H. v. Gerald D.*, 491 U.S. 110, 127–128, n. 6 (1989) (opinion of SCALIA, J.). But such a view would be inconsistent with our law. It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. * * *

Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects. See U.S. Const., Amdt. 9. As the second Justice Harlan recognized:

"[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment." *Poe v. Ullman*, *supra*, [367 U.S.,] at 543, (opinion dissenting from dismissal on jurisdictional grounds).

Justice Harlan wrote as follows on an issue the full Court did not reach in *Poe v. Ullman*, but the Court adopted his position four Terms later in *Griswold v. Connecticut*, *supra*. * * *

Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage. Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code. The underlying constitutional issue is whether the State can resolve these philosophic questions in such a definitive way that a woman lacks all choice in the matter, except perhaps in those rare circumstances in which the pregnancy is itself a danger to her own life or health, or is the result of rape or incest.

* * * Our cases recognize "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt v. Baird*, *supra*, [405 U.S.,] at 453. * * * At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

These considerations begin our analysis of the woman's interest in terminating her pregnancy but cannot end it, for this reason: though the abortion decision may originate within the zone of conscience and belief, it is more than a philosophic exercise. Abortion is a unique act. It is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; and, depending on one's beliefs, for the life or potential life that is aborted. Though abortion is conduct, it does not follow that the State is entitled to proscribe it in all instances. That is because the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject

to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.

* * * [M]oreover * * * in some critical respects the abortion decision is of the same character as the decision to use contraception, to which *Griswold v. Connecticut*, *Eisenstadt v. Baird*, and *Carey v. Population Services International* afford constitutional protection. * * *

* * * We have seen how time has overtaken some of *Roe*'s factual assumptions: advances in maternal health care allow for abortions safe to the mother later in pregnancy than was true in 1973, * * * and advances in neonatal care have advanced viability to a point somewhat earlier. * * * But these facts go only to the scheme of time limits on the realization of competing interests, and the divergences from the factual premises of 1973 have no bearing on the validity of *Roe*'s central holding, that viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions. The soundness or unsoundness of that constitutional judgment in no sense turns on whether viability occurs at approximately 28 weeks, as was usual at the time of *Roe*, at 23 to 24 weeks, as it sometimes does today, or at some moment even slightly earlier in pregnancy, as it may if fetal respiratory capacity can somehow be enhanced in the future. Whenever it may occur, the attainment of viability may continue to serve as the critical fact, just as it has done since *Roe* was decided; which is to say that no change in *Roe*'s factual underpinning has left its central holding obsolete, and none supports an argument for overruling it.

* * * The country's loss of confidence in the Judiciary [resulting from the disregard of precedent in this case] would be underscored by an equally certain and equally reasonable condemnation for another failing in overruling unnecessarily and under pressure. Some cost will be paid by anyone who approves or implements a constitutional decision where it is unpopular, or who refuses to work to undermine the decision or to force its reversal. The price may be criticism or ostracism, or it may be violence. * * * The promise of constancy, once given, binds its maker for as long as the power to stand by the decision survives and the understanding of the issue has not changed so fundamentally as to render the commitment obsolete. * * *

IV

* * * We conclude that the basic decision in *Roe* was based on a constitutional analysis which we cannot now repudiate. The woman's liberty is not so unlimited, however, that from the outset the State

cannot show its concern for the life of the unborn, and at a later point in fetal development the State's interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted.

* * * We conclude the line should be drawn at viability, so that before that time the woman has a right to choose to terminate her pregnancy. * * *

* * * [T]he concept of viability, as we noted in *Roe*, is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman. * * * Consistent with other constitutional norms, legislatures may draw lines which appear arbitrary without the necessity of offering a justification. But courts may not. * * *

On the other side of the equation is the interest of the State in the protection of potential life. * * *

* * * [I]t must be remembered that *Roe v. Wade* speaks with clarity in establishing not only the woman's liberty but also the State's "important and legitimate interest in potential life. * * *

Though the woman has a right to choose to terminate or continue her pregnancy before viability, it does not at all follow that the State is prohibited from taking steps to ensure that this choice is thoughtful and informed. Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term and that there are procedures and institutions to allow adoption of unwanted children as well as a certain degree of state assistance if the mother chooses to raise the child herself. * * *

We reject the trimester framework, which we do not consider to be part of the essential holding of *Roe*. * * * The trimester framework suffers from these basic flaws: in its formulation it misconceives the nature of the pregnant woman's interest; and in practice it undervalues the State's interest in potential life, as recognized in *Roe*.

As our jurisprudence relating to all liberties save perhaps abortion has recognized, not every law which makes a right more difficult to exercise is, ipso facto, an infringement of that right. * * *

* * * Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause. * * *

* * * Not all burdens on the right to decide whether to terminate a pregnancy will be undue. In our view, the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty. * * *

* * * [W]e answer the question, left open in previous opinions discussing the undue burden formulation, whether a law designed to further the State's interest in fetal life which imposes an undue burden

on the woman's decision before fetal viability could be constitutional. * * * The answer is no.

Some guiding principles should emerge. What is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so. Regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose. See *infra*, at 899–900 (addressing Pennsylvania's parental consent requirement). Unless it has that effect on her right of choice, a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal. Regulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden. * * *

V

B

We next consider the informed consent requirement. 18 Pa. Cons. Stat. § 3205 (1990). Except in a medical emergency, the statute requires that at least 24 hours before performing an abortion a physician inform the woman of the nature of the procedure, the health risks of the abortion and of childbirth, and the "probable gestational age of the unborn child." The physician or a qualified nonphysician must inform the woman of the availability of printed materials published by the State describing the fetus and providing information about medical assistance for childbirth, information about child support from the father, and a list of agencies which provide adoption and other services as alternatives to abortion. An abortion may not be performed unless the woman certifies in writing that she has been informed of the availability of these printed materials and has been provided them if she chooses to view them.

Our prior decisions establish that as with any medical procedure, the State may require a woman to give her written informed consent to an abortion. * * * In this respect, the statute is unexceptional. Petitioners challenge the statute's definition of informed consent because it includes the provision of specific information by the doctor and the mandatory 24–hour waiting period. The conclusions reached by a majority of the Justices in the separate opinions filed today and the undue burden standard adopted in this opinion require us to overrule in part some of the Court's past decisions, decisions driven by the trimester framework's prohibition of all previability regulations designed to further the State's interest in fetal life. * * *

* * * [R]equiring that the woman be informed of the availability of information relating to fetal development and the assistance available should she decide to carry the pregnancy to full term is a reasonable measure to ensure an informed choice, one which might cause the woman to choose childbirth over abortion. This requirement cannot be considered a substantial obstacle to obtaining an abortion, and, it follows, there is no undue burden.

* * * Whether the mandatory 24–hour waiting period is nonetheless invalid because in practice it is a substantial obstacle to a woman's choice to terminate her pregnancy is a closer question. The findings of fact by the District Court indicate that because of the distances many women must travel to reach an abortion provider, the practical effect will often be a delay of much more than a day because the waiting period requires that a woman seeking an abortion make at least two visits to the doctor. The District Court also found that in many instances this will increase the exposure of women seeking abortions * * *

* * * [A]s we have stated, under the undue burden standard a State is permitted to enact persuasive measures which favor childbirth over abortion, even if those measures do not further a health interest. And while the waiting period does limit a physician's discretion, that is not, standing alone, a reason to invalidate it. * * *

We are left with the argument that the various aspects of the informed consent requirement are unconstitutional because they place barriers in the way of abortion on demand. Even the broadest reading of *Roe*, however, has not suggested that there is a constitutional right to abortion on demand. * * * Rather, the right protected by *Roe* is a right to decide to terminate a pregnancy free of undue interference by the State. Because the informed consent requirement facilitates the wise exercise of that right, it cannot be classified as an interference with the right *Roe* protects. The informed consent requirement is not an undue burden on that right.

C

Section 3209 of Pennsylvania's abortion law provides, except in cases of medical emergency, that no physician shall perform an abortion on a married woman without receiving a signed statement from the woman that she has notified her spouse that she is about to undergo an abortion. * * *

* * * In well-functioning marriages, spouses discuss important intimate decisions such as whether to bear a child. But there are millions of women in this country who are the victims of regular physical and psychological abuse at the hands of their husbands. Should these women become pregnant, they may have very good reasons for not wishing to inform their husbands of their decision to obtain an abortion. * * * Many may fear devastating forms of psychological abuse from their husbands, including verbal harassment, threats of future violence, * * *

The spousal notification requirement is thus likely to prevent a significant number of women from obtaining an abortion. It does not merely make abortions a little more difficult or expensive to obtain; for many women, it will impose a substantial obstacle. We must not blind ourselves to the fact that the significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases. * * *

Chief Justice Rehnquist, with whom Justice White, Justice Scalia, and Justice Thomas join, concurring in the judgment in part and dissenting in part.

The joint opinion, following its newly minted variation on *stare decisis*, retains the outer shell of *Roe v. Wade*, 410 U.S. 113 (1973), but beats a wholesale retreat from the substance of that case. We believe that Roe was wrongly decided, and that it can and should be overruled consistently with our traditional approach to stare decisis in constitutional cases.

I

* * *

In arguing that this Court should invalidate each of the provisions at issue, petitioners insist that we reaffirm our decision in *Roe v. Wade*, *supra*, in which we held unconstitutional a Texas statute making it a crime to procure an abortion except to save the life of the mother.[a] * * * Although they reject the trimester framework that formed the underpinning of *Roe*, Justices O'CONNOR, KENNEDY, and SOUTER adopt a revised undue burden standard to analyze the challenged regulations. We conclude, however, that such an outcome is an unjustified constitutional compromise, one which leaves the Court in a position to closely scrutinize all types of abortion regulations despite the fact that it lacks the power to do so under the Constitution. * * *

* * * Unlike marriage, procreation, and contraception, abortion "involves the purposeful termination of a potential life." *Harris v. McRae*, 448 U.S. 297, 325 (1980). The abortion decision must therefore "be recognized as sui generis, different in kind from the others that the Court has protected under the rubric of personal or family privacy and autonomy." *Thornburgh v. American College of Obstetricians and Gynecologists*, *supra*, [476 U.S.,] at 792, (WHITE, J., dissenting). One cannot ignore the fact that a woman is not isolated in her pregnancy, and that the decision to abort necessarily involves the destruction of a fetus. See *Michael H. v. Gerald D.*, *supra*, [491 U.S.,] at 124, n. 4, (To look "at the act which is assertedly the subject of a liberty interest in isolation from its effect upon other people [is] like inquiring whether there is a liberty interest in firing a gun where the case at hand happens to involve its discharge into another person's body").

* * * Because the undue burden standard is plucked from nowhere, the question of what is a "substantial obstacle" to abortion will undoubtedly engender a variety of conflicting views. For example, in the very matter before us now, the authors of the joint opinion would uphold Pennsylvania's 24–hour waiting period, concluding that a "particular burden" on some women is not a substantial obstacle. * * * But the

a. Two years after *Roe*, the GFCC, by contrast, struck down a law liberalizing access to abortion on the grounds that life developing within the womb is constitutionally protected. *Judgment of February 25, 1975*, 39 BVerfGE 1 (translated in Robert Jonas and John Gorby, *West German Abortion Decision: A Contrast to* Roe v. Wade, 9 John Marshall J. Prac. & Proc. 605 (1976)). In 1988, the Canadian Supreme Court followed reasoning similar to that of *Roe* in striking down a law that restricted abortion. *R. v. Morgentaler*, 1 S.C.R. 30, 44 D.L.R. 4th 385 (1988).

authors would at the same time strike down Pennsylvania's spousal notice provision, after finding that in a "large fraction" of cases the provision will be a substantial obstacle. * * * And, while the authors conclude that the informed consent provisions do not constitute an "undue burden," * * *

Furthermore, while striking down the spousal *notice* regulation, the joint opinion would uphold a parental *consent* restriction that certainly places very substantial obstacles in the path of a minor's abortion choice. The joint opinion is forthright in admitting that it draws this distinction based on a policy judgment that parents will have the best interests of their children at heart, while the same is not necessarily true of husbands as to their wives. * * * This may or may not be a correct judgment, but it is quintessentially a legislative one. The "undue burden" inquiry does not in any way supply the distinction between parental consent and spousal consent which the joint opinion adopts. Despite the efforts of the joint opinion, the undue burden standard presents nothing more workable than the trimester framework which it discards today. Under the guise of the Constitution, this Court will still impart its own preferences on the States in the form of a complex abortion code.* * *

Justice Scalia, with whom The Chief Justice, Justice White, and Justice Thomas join, concurring in the judgment in part and dissenting in part.

* * * The States may, if they wish, permit abortion on demand, but the Constitution does not require them to do so. The permissibility of abortion, and the limitations upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting. * * *

That is, quite simply, the issue in these cases: not whether the power of a woman to abort her unborn child is a "liberty" in the absolute sense; or even whether it is a liberty of great importance to many women. Of course it is both. The issue is whether it is a liberty protected by the Constitution of the United States. I am sure it is not. I reach that conclusion not because of anything so exalted as my views concerning the "concept of existence, of meaning, of the universe, and of the mystery of human life." * * * Rather, I reach it for the same reason I reach the conclusion that bigamy is not constitutionally protected—because of two simple facts: (1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed.[1]

1. The Court's suggestion, ante, at 847–848, that adherence to tradition would require us to uphold laws against interracial marriage is entirely wrong. Any tradition in that case was contradicted by a text—an Equal Protection Clause that explicitly establishes racial equality as a constitutional value. See *Loving v. Virginia*, 388 U.S. 1, 9 (1967) ("In the case at bar, ... we deal with statutes containing racial classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race"); see also *id.*, at 13 (STEWART, J., concurring in judgment). The enterprise launched in *Roe v. Wade*, 410 U.S. 113 (1973), by contrast, sought to establish—in the teeth of a clear, contrary tradition—a value found nowhere in the constitutional text * * *.

R. v. MORGENTALER

Supreme Court (Canada).
[1988] 1 S.C.R. 30.

Dickson, C.J.

The principal issue raised by this appeal is whether the abortion provisions of the *Criminal Code*, R.S.C. 1970, c. C–34, infringe the "right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice" as formulated in s. 7 of the *Canadian Charter of Rights and Freedoms*. The appellants, Dr. Henry Morgentaler [and others], have raised thirteen distinct grounds of appeal. * * * It is submitted by the appellants that s. 251 of the *Criminal Code* contravenes s. 7 of the *Canadian Charter of Rights and Freedoms* and that s. 251 should be struck down.

* * * [It] remains true that this Court cannot presume to resolve all of the competing claims advanced in vigorous and healthy public debate. Courts and legislators in other democratic societies have reached completely contradictory decisions when asked to weigh the competing values relevant to the abortion question. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973); *Paton v. United Kingdom* (1980), 3 E.H.R.R. (European Court of Human Rights); *The Abortion Decision of the Federal Constitutional Court—First Senate—of the Federal Republic of Germany*, February 25, 1975, translated and reprinted in (1976), 9 John Marshall J. Prac. and Proc. 605; and the *Abortion Act, 1967*, 1967, c. 87 (U.K.)

But since 1975, and the first *Morgentaler* decision, the Court has been given added responsibilities. * * * Although no doubt it is still fair to say that courts are not the appropriate forum for articulating complex and controversial programmes of public policy, Canadian courts are now charged with the crucial obligation of ensuring that the legislative initiatives pursued by our Parliament and legislatures conform to the democratic values expressed in the *Canadian Charter of Rights and Freedoms*. * * *

III. * * * The three appellants are all duly qualified medical practitioners who together set up a clinic in Toronto to perform abortions upon women who had not obtained a certificate from a therapeutic abortion committee of an accredited or approved hospital as required by s. 251(4). The doctors had made public statements questioning the wisdom of the abortion laws in Canada and asserting that a woman has an unfettered right to choose whether or not an abortion is appropriate in her individual circumstances.

Indictments were preferred against the appellants charging that they had conspired with each other with intent to procure abortions contrary to ss. 423(1)(d) and 251(1) of the *Criminal Code*. [The three were acquitted, and on appeal, the Supreme Court was confronted with the matter.] Per Dickson C.J. and Lamer J.:

[State] interference with bodily integrity and serious state-imposed psychological stress, at least in the criminal law context, constitutes a breach of security of the person. Section 251 clearly interferes with a